



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

March 10, 1993

Ms. Laura Portwood
Senior Assistant City Attorney
City of Houston
P.O. Box 1562
Houston, Texas 77251-1562

OR93-106

Dear Ms. Portwood:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, article 6252-17a, V.T.C.S. Your request was assigned ID# 18054.

The Houston Police Department (the department) received an open records request from a job applicant with the department for, *inter alia*, all documents pertaining to two of the department's investigations of the applicant's employment background. You contend that portions of the requested records come under the protection of sections 3(a)(8) and 3(a)(11) of the Open Records Act.

Section 3(a)(8), known as the "law enforcement" exception, excepts from required public disclosure:

records of law enforcement agencies and prosecutors that deal with the detection, investigation, and prosecution of crime and the internal records and notations of such law enforcement agencies and prosecutors which are maintained for internal use in matters relating to law enforcement and prosecution.

V.T.C.S. art. 6252-17a, § 3(a)(8). Whether this exception applies to particular records depends on whether their release would "unduly interfere" with law enforcement or prosecution. Open Records Decision Nos. 434 (1986); 287 (1981). You contend section 3(a)(8) protects the records at issue because

The most basic requirement in building a professional and effective police force is the ability to recruit and hire qualified officers and to refuse to hire those who do not meet minimum requirements. To screen out applicants who are not appropriate candidates for police officers, investigators must have access to full and frank information from former employers -- especially other law enforcement agencies.

Equally critical is the ability of previous employers to provide honest information about an application without fear of reprisals or lawsuits, even if such information is less than positive. The chilling effect of making public the comments of former employers or other references would lead to a serious decline in the Houston Police Department's ability to screen out unqualified applicants and would certainly result in less effective law enforcement. . . . It is clear that release of these background investigations would unduly interfere with the goals and objectives of the Department.

In Open Records Decision No. 361 (1983), this office considered whether information gathered on applicants with the Harris County Sheriff's Department came under the protection of section 3(a)(8) and concluded that the general contention that the possible effect the disclosure of such information might have on references' willingness to provide frank recommendations did not "appear to present an undue interference with law enforcement." *Id.* at 3. In this case, you make only the general argument rejected in Open Records Decision No. 361. You have not demonstrated that the release of this particular information would interfere with law enforcement interests. Accordingly, you may not withhold the information under section 3(a)(8).

Although this office will not ordinarily raise an exception that a governmental body has failed to claim, *see* Open Records Decision Nos. 455 (1987); 325 (1982), we will raise exceptions when the release of confidential information could impair the rights of third parties. The improper release of such information constitutes a misdemeanor. *See* V.T.C.S. art. 6252-17a, § 10(a). Section 3(a)(1) of the act protects "information deemed confidential by law, either Constitutional, statutory, or by judicial decision." We note that two small portions of the records at issue appear to reveal the results of polygraph examinations taken by the job applicant during the application process. Ordinarily, section 19A of article 4413(29cc), V.T.C.S., prohibits the release of results of polygraph examinations to the general public. However, in Open Records Decision No. 565 (1990) at 8, this office addressed whether polygraph examination information must be released to an examinee who had requested the information under the Open Records Act. In that decision this office held that

while not requiring disclosure, [section 19A] expressly permits the . . . release [of polygraph examination results] to the examinee. Thus, at least with respect to this requestor, no part of the polygraph examination may be said to be "deemed confidential by law" as required for exception from public disclosure under section 3(a)(1) [of the Open Records Act]. Thus, the polygraph examination may not be withheld from this requestor under section 3(a)(1).

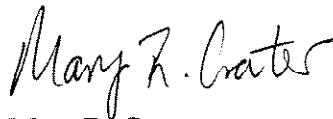
Here the requestor is the examinee. In accordance with Open Records Decision No. 565, any information which constitutes the results of a polygraph examination may not be withheld pursuant to section 3(a)(1).

You also claim that portions of requested records constitute "inter-agency or intra-agency memorandums or letters which would not be available by law to a party in litigation with the agency" under section 3(a)(11) of the act and, therefore, are excepted from public disclosure. For several months now, the effect of the section 3(a)(11) exception has been the focus of litigation. In *Texas Department of Public Safety v. Gilbreath*, No. 3-92-024-CV (Tex. App.--Austin, November 25, 1992, n.w.h.), the Third Court of Appeals recently held that section 3(a)(11) "exempts those documents, and only those documents, normally privileged in the civil discovery context." *Gilbreath* at 7. The court has since denied a motion for rehearing this case.

We are currently reviewing the status of the section 3(a)(11) exception in light of the *Gilbreath* decision. In the meantime, we are returning your request to you and asking that you once again review the information and your initial decision to seek closure of this information. We remind you that it is within the discretion of governmental bodies to release information that may be covered by section 3(a)(11). If, as a result of your review, you still desire to seek closure of the information, you must re-submit your request and the documents at issue, along with your arguments for withholding the information pursuant to section 3(a)(11). You must submit these materials within 15 days of the date of this letter. This office will then review your request in accordance with the *Gilbreath* decision. If you do not timely resubmit the request, we will presume that you have released this information.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR93-106.

Yours very truly,



Mary R. Crouter
Assistant Attorney General
Opinion Committee

MRC/RWP/lmm

Ref.: ID# 18054
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Enclosure: Submitted documents